

Before The
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing a Unified Inter-carrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109

COMMENTS OF COMPTTEL

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SUMMARY

This proceeding provides the Commission with a historic opportunity to reform the intercarrier compensation and universal service systems for the 21st Century. Although the ABC Plan provides a useful starting point for reform, its central purpose is the perpetuation of ILEC revenues, not creating a balanced transition to an IP future. COMPTTEL hereby presents a *Competitive Amendment*, which corrects the major deficiencies to the ABC Plan related to intercarrier compensation, and offers a proposal more in line with the Commission's articulated objectives, as well as, the requirements of the Communications Act of 1934, as amended ("Act").

The *most* important action the Commission can take to attain its overarching goal of promoting the deployment of broadband and IP technology is to confirm that IP-to-IP interconnection is subject to Sections 251 and 252 of the Act. The ABC Plan does *nothing* to promote the deployment of next generation IP networks because it further entrenches the greatest obstacle to such deployment: The refusal by most ILECs to negotiate interconnection agreements that comply with the critical competitive protections of Sections 251 and 252 of the Act.

The ABC Plan is designed to perpetuate and protect *ILEC* revenues, while dramatically reducing competitors' revenues and denying competitors access to cost-based transport as required by law. In contrast, the *Competitive Amendment* provides a framework that addresses the needs of the industry as a whole, incorporating key changes to:

- Foster a rapid transition to all IP networks, by confirming that IP-to-IP interconnection is subject to Sections 215/252 of the Act;
- Foreclose arbitrage by treating VoIP traffic as any other traffic during the transition period;
- Comply with the statutory mandate that *all* transport and termination rates for traffic under section 251(b)(5) be cost-based;

- Establish a competitively neutral transition plan to reduced intercarrier compensation rates by providing CLECs the same effective time-period to adjust to lower intercarrier compensation revenues that the plan provides the incumbents and incorporate balanced increases in the multi-line business SLC to reduce the ARM and promote fairness;
- Place a fiscally responsible hard-cap on the absolute size of the access recovery mechanism; and
- Provide a mechanism for LECs to charge reciprocal compensation rates when no ICA exists between two carriers by allowing them to file a transport and termination tariff with the FCC that contains the default rates established by the Plan.

COMPTTEL supports the core recommendation of the ABC Plan, that the Commission should bring all types of traffic (i.e., interstate, intrastate, local, VoIP and circuit-switched) under Section 251(b)(5) of the Act. Indeed, the statute requires this approach to the extent the Commission asserts jurisdiction over the transport and termination of all traffic. The Commission cannot preempt the states' authority and regulate the transport and termination of all traffic as interstate access under Section 201 of the Act because the *federal statute* requires that transport and termination be regulated pursuant to Section 251(b)(5). Nor can the Commission preempt, or otherwise eliminate, the states' role defined by the *federal statute* in Section 252 to review, approve and arbitrate the interconnection agreements that will, among other terms and conditions, address the requirements of Section 251(b)(5).

Finally, COMPTTEL supports transforming current universal service plans to support broadband network deployment in high-cost areas, as described in the National Broadband Plan. Similarly, COMPTTEL supports the stated goal of the ABC Plan to focus on distributing universal service support to areas of the nation where "there is no private sector business case" for broadband network deployment. To achieve that goal, however, the Commission should ensure that all carriers – incumbent and competitive, wireless and wireline – are provided the same opportunity to deploy broadband to unserved and underserved areas. Accordingly: (1) bidding

processes for USF support should be carrier neutral as well as technology neutral and (2) USF recipients should operate open networks that are fully interconnected and integrated with existing networks. With regard to retail rate regulation and carrier of last resort obligations (“COLR”), the Commission should follow the statutory procedures legislated by Congress in the Act in evaluating whether and to what extent it should eliminate legacy regulation or preempt state laws and regulations.

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COMMENTS OF COMPTTEL

COMPTTEL respectfully submits these comments, pursuant to the Federal Communications Commission’s (“Commission”) Public Notice released on August 3, 2011 (DA 11-1348) in the above-referenced dockets, in response to the Commission’s Further Inquiry Into Certain Issues in the Universal Service Fund (“USF”) and Intercarrier Compensation (“ICC”) Transformation Proceeding (“Further Inquiry”).¹ In the *Further Inquiry* the Commission seeks comments on aspects of the State Members of the Federal-Joint Universal Service Joint Board (State Members), the “RLEC Plan” put forth by the Joint Rural Associations, and the “America’s Broadband Connectivity Plan” filed by six Price Cap Companies (“ABC Plan”) and how these

¹ These Comments reflect the position of a majority of COMPTTEL members. Individual members may be filing separate comments where they advocate positions on some issues that are different from those stated herein. Sprint Nextel does not join in these comments.

plans comport with the Commission's articulated objectives and statutory requirements. The Commission also invites comment on additional issues not fully developed in the record.

I. INTERCARRIER COMPENSATION – THE COMMISSION SHOULD ADOPT THE PROPOSALS IN THE *COMPETITIVE AMENDMENT*

COMPTEL members have invested billions of dollars in local broadband networks, in part with the expectation that any reform would provide a stable, lawful, cost-based system of intercarrier compensation. As we explain below, the plans proposed by the incumbent local exchange carriers ("ILECs") are principally designed to perpetuate and protect *ILEC* revenues, while dramatically reducing competitor revenues and denying competitors access to cost-based transport as required by law. Moreover, the ILEC proposals do virtually *nothing* to promote the deployment of next generation IP networks² because their proposals further entrench the greatest obstacle to such deployment: The refusal by most ILECs to negotiate interconnection agreements that comply with the critical competitive protections of Sections 251 and 252 of the Act.

Addressed below, and attached to these comments, COMPTEL presents a *Competitive Amendment* to the ABC Plan that amends its most significant deficiencies with regard to intercarrier compensation.³ Significantly, the *Competitive Amendment* does *not* represent an

² The sole element of the ILEC intercarrier compensation proposals that should encourage IP deployment is the recognition that the Commission must remove the cloud of uncertainty surrounding the compensation obligations of VoIP traffic (at least on a prospective basis). As we explain below, however, the Commission should *not* determine that VoIP traffic will be subject to interstate, but not intrastate, access charges and, thereby introduce a new, technology-based, arbitrage opportunity as part of a decision intended to achieve the opposite result. Such a finding is certain to create additional disputes as the carrier terminating "VoIP traffic" has no ability to determine the technology used to originate the call. We discuss the appropriate treatment of VoIP for intercarrier compensation purposes in more depth below.

³ Attachment 1 to these comments is a copy of the *Competitive Amendment* in legislative format to more easily identify its differences with the ABC Plan, whereas, Attachment 2 provides a clean version of the *Competitive Amendment* to make it easier to analyze the Plan as

intercarrier compensation reform plan that would be COMPTTEL's first choice if its only goal was to maximize the competitive opportunity of its members. Rather, the *Competitive Amendment* accepts the basic framework of the plan put forth by the price cap carriers and only seeks to amend those provisions most detrimental to competition so that the resulting framework addresses the needs of a broader industry than just the largest ILECs in the nation.

Specifically, our principal changes are intended to remove the uncertainty over IP-to-IP interconnection (which is the real barrier to IP deployment); make necessary adjustments to the plan to ensure that it complies with the statutory mandate that *all* transport and termination rates are cost-based; and proposes a transition for CLEC access rates that provides the same effective time-horizon to adjust to lower intercarrier compensation revenues that the plan provides the incumbents. Although we are troubled by the ABC Plan's proposal for an "access recovery mechanism" that is divorced from any needs-based showing, we address that concern through a hard-cap on its absolute size. We also propose that the cap on multi-line business SLC be removed and that the ARM be annually reduced to reflect an assumed increase in such charges equal to the increases that the ABC Plan recommends for residential and single-line business customers.⁴

amended. The *Competitive Amendment* is focused on the intercarrier compensation provisions of the ABC Plan because it is those areas of the Plan that are most critical to COMPTTEL members. COMPTTEL is also concerned with several elements of the Plan related to universal service reform and will discuss those concerns below. COMPTTEL has not, however, drafted a detailed amendment to the USF provisions to address its concerns.

⁴ Other changes to the ABC Plan introduced by the *Competitive Amendment* are a provision that would allow LECs to file a transport and termination tariff with the FCC that contains the default rates established by the Plan. Although we would expect most traffic to be governed by interconnection agreements ("ICAs") approved pursuant to Section 252 of the Act, there will always be instances where a LEC terminates a call for a carrier with whom it has no ICA. Consequently, this provision of the *Competitive Amendment* is intended to create an enforceable obligation to assure compensation from all traffic. In addition, the *Competitive*

If the Commission adopts COMPTEL’s proposal it will achieve its objectives to eliminate arbitrage and promote additional investment – including competitive investment – in America’s broadband future.

A. The Proposals Do Not Facilitate the Transition to IP Networks

The Commission seeks comment on how the proposals comport with the Commission’s articulated objectives and statutory requirements.⁵ The Commission, in its *NPRM*, makes clear that one of the main goals of ICC reform is to facilitate carriers’ movement to IP networks.⁶ None of the three proposals, however, promote the transition to IP networks. The ABC Plan excludes IP-to-IP interconnection from its proposal all together.⁷ Addressing only TDM-based services in an ICC Reform Plan does not promote the transition to IP networks.

In its *NPRM*, the Commission asked what specific actions it should take besides reforming intercarrier compensation to encourage the transition to IP technology and how IP-to-IP interconnection arrangements for the exchange of VoIP traffic fit within existing legal and technical frameworks.⁸ COMPTEL responded that the *most* important action the Commission can take to attain its overarching goal of promoting the deployment of broadband and IP technology is to confirm that IP-to-IP interconnection is subject to Sections 251 and 252 of the

Amendment includes a provision to make clear that state commissions will have an important role reviewing, for their respective states, the data used to calculate the default rates.

⁵ *Further Inquiry* at 1-2.

⁶ *NPRM* at ¶ 10.

⁷ ABC Plan, Attachment 1, Framework of the Proposal at n. 10. [“This framework applies only to TDM interconnection.”]

⁸ *NPRM* at ¶ 679.

Act.⁹ Additionally, in its initial round of comments in response to the *NPRM*, COMPTTEL explained that VoIP service clearly falls under the statutory definition of a telecommunications service.¹⁰ Confirmation from the Commission on these points is not only in accordance with the Act, but is necessary to ensure carriers enter into good faith carrier-to-carrier negotiations of just and reasonable terms for IP interconnection.¹¹

As the record demonstrates, there is an immediate need for such confirmation. Indeed, in discussing the hindrances to the transitioning to IP networks, the *NPRM* notes evidence of the ILECs' refusal to provide competitors IP interconnection on reasonable terms, if at all, forcing competitors to reduce their calls to TDM with all of its associated costs, inefficiencies, and limitations.¹² The ILECs refusal to honor their obligations under the Act is a major obstacle to competitive carriers' ability to transit to IP networks. Legal certainty is needed for investment

⁹ COMPTTEL Comments, WC Docket No. 10-90 *et al*, at 4 (filed Apr. 18, 2011).

¹⁰ COMPTTEL Comments, WC Docket No. 10-90 *et al*, at 2-7 (filed Apr. 1, 2011). *See also*, Comments of COMPTTEL, *In the Matter of tw telecom inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(3) of the Communications Act*, WC Docket No. 11-119, pp. 6-9 (filed Aug. 15, 2011) [A carrier providing facilities-based VoIP services is a telecommunications carrier under the Act.] COMPTTEL also explains how facilities-based VoIP providers are offering telephone exchange service and exchange access service using packet-switched networks. *Id* at 9-11. *See also*, Petition for Declaratory Ruling of tw telecom inc., WC Docket No. 11-119 (filed Jun. 30, 2011).

¹¹ AT&T, Verizon and CenturyLink/Qwest have resisted allowing their competitors to interconnect on an IP-to-IP basis for the exchange of VoIP traffic pursuant to Section 251. COMPTTEL April 8 Comments at 7.

¹² *NPRM* at n. 729, *citing* Cablevision Comments in re NBP PN #25 at 2 (filed Dec. 22, 2009) (“[E]ven as incumbent local exchange carriers (“ILECs”) upgrade their legacy networks to IP, they refuse to provide IP interconnection to their competitors on reasonable terms or at all. As a result, each IP voice call initiated on a competing carriers’ network must be reduced to TDM, transmitted over an electrical DS-0 or similar connection, and routed to an ILEC customer over the legacy hierarchical circuit-switched network, with all of its associated costs, inefficiencies, and limitations”).

confidence and for carriers to begin negotiating the next generation of interconnection agreements that include terms and conditions that accommodate IP network architecture. The RBOCs must not be allowed to continue to relegate competitors to TDM interconnection and facilities (where a packet alternative has been deployed), or require that they surrender competitive protections provided for by the Act in order to obtain a modern, packet-based, interconnection arrangement.

Importantly, COMPTTEL is not asking the Commission to create new policy or law. In essence, the Commission has *already* found direct IP-to-IP interconnection to be subject to section 251 of the Act. Specifically, in order to ensure that Commission's "rules make it possible for competing telecommunications providers to offer seamless service to end-users by interconnecting with incumbents' networks," the Commission declared the following:

[I]nterconnection obligations of sections 251(a) and 251(c)(2) apply to incumbents' packet-switched telecommunications *networks* and the telecommunications services offered over them...[rejecting the argument] that Congress intended that section 251(c) not apply to new technology not yet deployed in 1996. Nothing in the statute or legislative history indicates that it was intended to apply only to existing technology. Moreover, Congress was well aware of the Internet and packet-switched services in 1996, and the statutory terms *do not include any exemption* for those services.¹³

Requiring TDM conversion cannot be squared with the obligation to permit interconnection to "the incumbents' packet-switched telecommunications networks." Moreover, as tw telecom and

¹³ Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, CCB/CPD No. 98- RM 9244, FCC 99-188, ¶¶48-49 (1998). Subsequently, in the *Advanced Services Remand Order*, the Commission again states that "the interconnection obligations set forth in section 251(c)(2) apply to packet-switched services as well as circuit-switch services." Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78 98-91, FCC 99-413, ¶22 (1999).

other carriers have explained, converting IP voice traffic to TDM format solely for the purpose of handing the traffic off at an interconnection point is not seamless when both of the interconnecting carriers' transport networks are packet-switched based. It increases inefficiencies and costs and reduces voice quality through unnecessary protocol conversion.¹⁴ In such cases, direct IP-to-IP interconnection is necessary for seamless interconnection. Furthermore, as the United States Supreme Court found, the "FCC has long construed § 251(c)(2) to require incumbent LECs to provide, at cost-based rates, *any technically feasible method of obtaining interconnection...*"¹⁵ The statute does not provide an exception for IP-to-IP interconnection.

The Commission does not need to establish detailed technical regulations governing IP-to-IP interconnection at this time. Rather, it is sufficient for the Commission to allow such details to be addressed in bilateral negotiations between incumbent LECs and competitive LECs, subject to state regulatory commission oversight under Section 252 of the Act.

B. The Commission Should Adopt the 251(b)(5) Framework for Reform

The Commission seeks comment on the State-Federal framework proposed by the State Members.¹⁶ COMPTTEL agrees with the State Members that the states should continue to have a meaningful role with regard to intercarrier compensation rates, but that role should be the one established by Sections 251 and 252 of the Act. In this regard, COMPTTEL agrees with the

¹⁴ TWTC Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(3) of the Communications Act, WC Docket No. 11-119, at 6 (filed Jun. 30, 2011); Letter of William Weber *et al* to Marlene Dortch, GN Docket No. 09-51, p. 2, filed on Sept. 22, 2009.

¹⁵ *Talk America*, slip op. at 8, *citing* 47 CFR §51.321(a)(emphasis added.)

¹⁶ *Further Inquiry* at 12.

framework proposed by the ABC Plan to the extent it proposes the Commission bring all types of traffic (i.e., interstate, intrastate, local) under to Section 251(b)(5) of the Act.¹⁷ Indeed, the statute *requires* this approach to the extent the Commission asserts jurisdiction over the transport and termination of all traffic. The Commission cannot preempt the state’s authority and regulate the transport and termination of all traffic as interstate access under Section 201 of the Act (as the ABC Plan seems to suggest in its alternative theory of the Commission’s ability to assert jurisdiction)¹⁸ because the *federal statute* requires that transport and termination be regulated pursuant to Section 251(b)(5). Nor could the Commission preempt, or otherwise eliminate, the state’s role under the *federal statute* (namely the role given to the states under Section 252).

Unquestionably, intercarrier compensation should be reformed in a manner that ensures the rates for the transport and termination of traffic not vary by the jurisdictional nature of the traffic (i.e., interstate, intrastate, or local). Having varying rates based on the historical jurisdictional labels given to traffic has led to arbitrage and billing disputes. This is nonsensical since carriers perform similar functions, and the costs do not vary when terminating local, intrastate or interstate traffic. The Commission should not perpetuate these artificial geographic and financial distinctions for traffic exchanged by carriers. In addition to the legality of the approach, the policy advantage of bringing all traffic under section 251(b)(5) is that it allows the Commission to ultimately

¹⁷ As we explain below, however, the Section 251 structure must be implemented consistently for all transport and termination, and not selectively as recommended by the ABC Plan.

¹⁸ In their Legal Analysis, the proponents of the ABC Plan argue that the Commission can preempt states regimes where the Commission finds that the state’s exercise of authority would negate the exercise of the Commission’s authority over intercarrier compensation for interstate communications, which the Commission regulates under section 201. *See* ABC Plan, Att. 5 at 31; *see also id.* at 18 (“The Commission [in addition to its authority to establish a uniform default rate under section 251 and 252 of the Act] has authority to establish a uniform default rate for all traffic, regardless of provider or technology, pursuant to its authority under sections 201 and 332 and the “inseverability” doctrine.”)

establish certainty and a uniform methodology - and requires the states to set a unified rate - for the transport and termination all types of traffic (i.e., interstate, intrastate, and local).

The Commission has clear authority to establish such rules. While Section 152(b) may prevent the Commission from regulating intrastate communications based on ancillary jurisdiction, as the US Supreme Court stated in *AT&T v. Iowa Utilities Board*, the “FCC has rulemaking authority to carry out the provisions of [the Communications Act] which include §§ 251 and 252, added by the Telecommunications Act of 1996.. [and this authority] is unaffected by 47 U.S.C. §152(b).”¹⁹ Indeed, the Supreme Court has specifically upheld the FCC’s jurisdiction to design a pricing methodology to bind the state rate making decisions.²⁰

Moreover, as the DC Circuit stated in *United States Telecom Association v. FCC*, “an agency *cannot* [] exclude from coverage certain items that clearly fall within the plain meaning of a statutory term.”²¹ Section 251(b)(5) imposes on all LECs the “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.”²² The Commission has determined (in reconsidering its earlier determination in the *Local Competition First Report and Order* that section 251(b)(5) was limited to local traffic),²³ the scope of this

¹⁹ *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378-380 (1999).

²⁰ *Verizon v. FCC*, 535 U.S. 467, 494 (2002), *citing AT&T Corp. v. Iowa Utl. Bd.* at 385.

²¹ *United States Telecom Association v. FCC*, 359 F.3d 554, 592 (D.C. Cir. 2004)(emphasis added).

²² 47 U.S.C. § 251(b)(5).

²³ Order on Remand and Report and Order, *High Cost Universal Service Support, et al*, WC Docket Nos. 05-337, 03-109, 06-122, 04-36 and CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, FCC 08-262, ¶ 7 (2008)(“ ISP Second Remand Order”).

provision is not limited geographically, to a particular type of service,²⁴ or to traffic exchanged between LECs.²⁵ Thus, the Act dictates the Commission's approach, as the statute puts the regulation of the compensation for the transport and termination of traffic under 251(b)(5).

Granted, as the Commission and others have noted, the statute preserves the access regime until the Commission adopts regulations.²⁶ But, as the ABC Plan acknowledges, “[o]nce the Commission removes this or any class of traffic from the scope of section 251(g) by superseding previous rules, *that traffic becomes subject to section 251(b)(5)* – as it would have been from the beginning if Congress had not temporarily grandfathered such traffic from the effects of section 251 when it enacted the 1996 Act.”²⁷ The Commission, therefore, is not free to merely invoke the “inseverability doctrine” to preempt states and then regulate the transport and termination of all traffic as interstate under Section 201 of the Act, as the alternative approach in ABC Plan seems to suggest. Such action would violate the federal statute which unambiguously requires the regulation regarding the compensation for the transport and termination of traffic to be pursuant to section 251(b)(5).²⁸

Significantly, not only is section 251(b)(5) the legally sustainable approach, there is no need to usurp the state commissions' role under this approach in order to address the Commission's concerns related to the arbitrage and the claims regarding the inseverability of the

²⁴ *ISP Second Remand Order* at ¶ 8.

²⁵ *Id* at ¶ 10.

²⁶ *NPRM* at ¶ 514.

²⁷ ABC Plan, Attachment 5 at 12-13(emphasis added).

²⁸ It is unclear if the proponents of the ABC Plan are suggesting regulating intrastate and interstate traffic as interstate access under section 201, while leaving local traffic under reciprocal compensation arrangements. But such action would not even amount to a unified rate.

traffic. Even though the ABC Plan generally offers support for a section 251(b)(5) approach for reforming intercarrier compensation, the ABC Plan also seems to suggest the Commission completely eliminate the states' role in the regulation of intercarrier compensation in order to establish a "uniform rate." The federal statute – which the Commission cannot preempt or violate – gave states a role under the 251/252 statutory regime.

Even if complete elimination of the states' role were legal (which it is not), none of the arguments posed in the ABC Plan's legal analysis support such dramatic action. The Commission has no need to go beyond placing all traffic under section 251(b)(5) in order to address the problems fostered by the current regime. Pursuant to section 251(b)(5) each carrier will charge the cost-based reciprocal compensation rate for terminating traffic regardless of historical jurisdictional labels. Consequently, the impossibility or impracticality of separating the service's intrastate from interstate components is irrelevant, since all would be treated as reciprocal compensation.

When the rate for terminating traffic does not vary by jurisdictional classification (i.e., intrastate access, interstate access, and local), as would be the case under section 251(b)(5), the concerns with carriers being forced to develop systems to separate traffic by jurisdiction, "geography-independent services," and arbitrage are addressed.²⁹ As the State Members stated in their comment, these goals do "not require national rate uniformity for originating or terminating service. It merely requires that all buyers of a single service at a single location must

²⁹ The ABC Plan argues that continued state regulation of intercarrier compensation would pose a direct obstacle to the accomplishment of the Commission's longstanding policy goals, namely the strong federal policy in favor of a uniform rate. First, the ABC Plan provides no indication that by a uniform intercarrier compensation rate the Commission meant a single nationwide rate. Nevertheless, even if that is the intended goal of the Commission, a stated goal in itself does not justify preemption. There must be a valid policy interest in implementing that goal, which the ABC Plan does not provide.

pay the same rate.”³⁰ Consequently, the fact that Congress assigned State commissions the responsibility to set actual rates for the transport and termination of Section 251(b)(5) traffic should not cause the Commission concern.

The Supreme Court affirmed that the Commission has jurisdiction to establish a pricing methodology,³¹ even if “[s]etting specific prices goes beyond the [Commission’s] authority to design a pricing methodology and intrudes on the states’ right to set the actual rates pursuant to § 252(c)(2).”³² It is both reasoned and settled law that the states apply the pricing standards of Section 252(d)(2) and implement the Commission’s methodology to set actual rates.³³ Contrary to the assertion made in the ABC Plan Legal Authority White Paper, this is not a “narrow interpretation” of the Supreme Court’s decision. The authors of the White Paper argue that nothing in the Court’s decision suggests that designing the methodology is the “outer limits” of the Commission’s authority.³⁴ On the contrary, the Supreme Court decision specifically states: “It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.”³⁵ Indeed, this holding considered whether, by dictating the methodology, the Commission encroached on the States’ ability to establish the rates.³⁶

³⁰ State Member Comments at 148.

³¹ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 385 (1999).

³² *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000).

³³ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 384-385 (1999).

³⁴ ABC Plan, Attachment 5, Legal Authority White Paper at 16.

³⁵ *AT&T Corp v. Iowa Utilities Board* at 384.

³⁶ *Id.* (“The FCC’s prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory “Pricing standards” set forth in § 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.”)

Contrary to the claim in the White Paper, setting a cap – particularly a cap *below* the cost-based rates defined by the Commission’s own rules - is not the same as establishing a methodology. Section 252(d)(2) provides that State commissions may not find that terms and conditions for reciprocal compensation are just and reasonable unless they provide for the — “mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier’s network.”³⁷ State commissions that have conducted cost proceedings have argued that the terminating rate of \$0.0007, proposed by the ABC Plan, has no basis in cost and is in fact not a cost-based rate.³⁸ In the *ISP Remand Order*, to which the Plan’s Legal Analysis repeatedly refers, the Commission effectively acknowledged that the \$0.0007 rate could be below the cost to terminate the traffic.³⁹

³⁷ 47 USC 252(d)(2)(A).

³⁸ See, e.g., Letter from James Bradford Ramsey, Counsel to the State Members of the Federal State Joint Board on Universal Service, to Marlene Dortch, Secretary, FCC, Docket Nos. 10-90, 09-51, 07-135, 05-337, 01-92, 96-45 and 03-109, (July 14, 2011) at 2 (“there is NO record evidence - no empirical data - no actual cost studies - to support imposing a single industry-wide \$0.0007 rate as compensatory” and the Michigan approved local termination rate for Verizon is \$0.003461 and for a small LEC is \$0.00703) and 8 (“This [\$0.0007] rate is even below TELRIC-based reciprocal compensation rates”); Reply Comments of the California Public Utilities Commission and the People of the State of California, Docket Nos. 05-337, 96-45, 03-109, 06-122, 99-200, 96-98, 01-92, 99-68 and 04-36, at 14 (Dec. 22, 2008) (“rates in the zero to \$.0007 range, which are lower than rates determined using the TELRIC methodology”); Comments of the Corporation Commission of the State of Kansas on All Sections of the February 9, 2011 NPRM Except Section XV, Docket Nos. 10-90, 09-51, 07-135, 05-337, 01-92, 96-45 and 03-109, at 5 (Apr. 18, 2011) (“FCC should acknowledge that because costs vary by carrier and thus, the ICC rate may vary by carrier”); Letter from Greg Jergeson, Chairman, Montana Public Service Commission, to Marlene Dortch, Secretary, FCC et al., Docket No. 01-92, at 2 (Aug. 18, 2008) (Qwest’s “cost for carrier access... is closer to \$.0404/minute, nowhere near the rumored \$.0007/minute rate”).

³⁹ Order On Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, et al CC Docket Nos. 96-98 and 99-68, FCC 01-131 ¶84 (2001) (“ISP Remand Order”) (The Commission made no finding on the actual cost).

Under the sections 251/252 statutory regime, the Commission has established a methodology for determining the rates and the states have set reciprocal compensation rates based on that methodology. There is no need for further state action in setting rates at this time. The Commission should adopt a transition plan that ends in the application of existing reciprocal compensation rates for the transport and termination of all traffic. To the extent that the Commission desires the states to conduct additional cost studies, that analysis should consider the costs associated with the transport and termination of IP traffic and not revisit the costs associated with the TDM architecture that is being replaced.

The Commission has no *experience* with whether there would be any remaining arbitrage if all transport and termination were subjected to the requirements of Sections 251(b)(5) and 252(d)(2). The *Competitive Amendment* recommended by COMPTTEL will dramatically reduce intercarrier compensation rates (to cost-based levels) and completely eliminate (unlike the ABC plan)⁴⁰ any rate differentials based on jurisdictional labels. The Commission should first implement the most legally sustainable and economically efficient solution – i.e., transport and termination rates that comply with the 252(d)(2) pricing standard, as defined by the Commission and applied by state commissions – before it tries to correct any residual problem that has yet to arise.

C. Transport Elements Must be Included in ICC Reform

The Commission seeks comment on the ABC Plan’s proposal for substantially reforming terminating rates for end office switching while taking a more limited approach to reforming

⁴⁰ As we explain in the following section, the “uniformity” of the ABC Plan is an illusion. Rather, the Plan proposes to maintain jurisdictional price differences for dedicated transport by applying access, and not reciprocal compensation rates, to dedicated capacity carrying access traffic.

certain transport elements and originating access.⁴¹ As a threshold point, COMPTTEL agrees that there is no need for the Commission to take any action to address originating access charge rate levels. Section 251(b)(5) does not address origination of traffic. Since the Commission has no legal authority (without preemption) to regulate the compensation for the origination of an intrastate call, the Commission should at least wait to see if any issue involving originating access arises before claiming that it must assert jurisdiction over the traffic.⁴²

Transport, on the other hand, is a different matter. The statute does not offer the Commission a choice as to whether 251(b)(5) – and, as a consequence, the pricing requirements of §252(d)(2) – apply to only termination but not transport, or only some forms of transport, but not to others. The statute unambiguously applies to both the transport *and* termination of traffic.⁴³ As the DC Circuit stated in *United States Telecom Association v. FCC*, “an agency *cannot* [] exclude from coverage certain items that clearly fall within the plain meaning of a

⁴¹ *Further Inquiry* at 13.

⁴² Notably, originating access only applies (in a meaningful way) in those instances where an interexchange carrier provides long distance service to a customer that obtains local service from another provider. The most recent statistics from the Commission indicate, however, that over 70% of residential lines are presubscribed to the ILEC or its affiliate for long distance service (and over 60% of all residential and business subscribers) and, as a result, the level of originating access rates is largely irrelevant. See Local Telephone Competition: Status as of June 30, 2010, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, released March 2011, Table 7. Moreover, there is no evidence that local exchange carriers are able to increase originating access charges given the current legal and market structure applicable to such charges. If a LEC *could* sustain higher profits by increasing its originating access charges, it would already do so irrespective of what changes are occurring to its terminating revenues.

⁴³ The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 USC 251(b)(5)(emphasis added).

statutory term.”⁴⁴ Once the Commission brings all calls under section 251(b)(5) (irrespective of their previous jurisdictional label as interstate access, intrastate access, local, VoIP or any other categorization) the provisions of Sections 251(b)(5) and the associated pricing regulations under 252(d)(2) apply with equal force to *all* transport, as well as termination.

The Commission’s rules and Orders fully recognize that transport can take alternative forms – *i.e.*, transport involving tandem switching (commonly referred to as tandem switched transport) and dedicated transport.⁴⁵ In its initial decision implementing the 1996 Act, the Commission addressed this point directly:

Many alternative arrangements exist for the provision of transport between the two networks. These arrangements include: dedicated circuits provided either by the incumbent LEC, the other local service provider, separately by each, or jointly by both; facilities provided by alternative carriers; unbundled network elements provided by incumbent LECs; or similar network functions currently offered by incumbent LECs on a tariffed basis. Charges for transport subject to section 251(b)(5) should reflect the forward-looking cost of the particular provisioning method.⁴⁶

Moreover, in adopting rules to address the cost-based pricing structure and cost-based proxy rates for transport and termination of traffic subject to section 251(b)(5), *i.e.*, reciprocal compensation, the Commission repeatedly addresses dedicated transport (ensuring that competitors did not pay more than their appropriate share of the cost of dedicated transmission

⁴⁴ *United States Telecom Association v. FCC*, 359 F.3d 554, 592 (D.C. Cir. 2004)(emphasis added).

⁴⁵ The Commission’s rules define transport as (47 CFR 51.701(c)): “*Transport*. For purposes of this subpart, transport is the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.”

⁴⁶ First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 et al*, FCC 96-325, 11 FCC Rcd 15499, ¶1039 (1996).

facilities),⁴⁷ as well as tandem-switched transport, leaving no doubt that dedicated transport is encompassed in the term “transport” under section 251(b)(5). For example, under the Commission’s rules establishing a rate structure for transport and termination of traffic that falls under section 251(b)(5), the Commission requires state commissions to establish rates for transport consistent with its rules in 47 CFR §§ 51.507 and 51.509.⁴⁸ Those sections address “dedicated transmission links”⁴⁹ and established default proxy rates for dedicated transmission links.⁵⁰ Consequently, once the Commission brings all interstate and intrastate traffic under section 251(b)(5), the dedicated transport associated with such traffic is subject to the Commission’s reciprocal compensation methodology and proxy rules, and state arbitration where applicable.

Even though the Commission’s rules reflect that the legal obligation of Section 251(b)(5) applies to both transport and termination – and the engineering reality that transport can be either dedicated or switched through a tandem – the ABC Plan (as we understand it)⁵¹ proposes to reform only the rates for termination and one form of transport (that involving tandem switching). Specifically, the Plan proposes to reduce intrastate transport rates to their interstate equivalent in the first two steps,⁵² and then on July 1, 2017:

⁴⁷ See e.g., 47 CFR §51.709(b).

⁴⁸ 47 CFR §51.709(a).

⁴⁹ 47 CFR §51.509(a).

⁵⁰ 47 CFR §§ 51.707 and 51.513(c)(3) and (4).

⁵¹ The ABC Plan’s recommendations regarding transport are not a model of clarity.

⁵² It is unclear whether the rates for tandem-switched transport are changed during the first two years of the plan. The plan does explicitly state, however, that: “During the first two steps

Each carrier unifies all terminating traffic under 251(b)(5) at a rate of \$0.0007 for transport and termination consistent with some existing interconnection agreements that have adopted the “ISP remand” rate. Beginning with this step, the rate for transport and termination shall only apply to termination at the end office where the terminating carrier does not own the serving tandem switch (in which case, additional charges may or may not apply depending on the arrangement used to deliver traffic), and it shall only apply to transport and termination within the tandem serving area where the terminating carrier does own the serving tandem switch.⁵³

This provision of the ABC Plan is most notable for what it (and other provisions of the Plan) does not explain. It appears that a rate of \$0.0007 would apply to terminate a call (where the point of interconnection occurs at the end office) or would apply to transport and terminate a call using tandem-transport, so long as the same ILEC owns the tandem and the end-office. However, there is no explanation as to what charges “may or may not apply” when the *form* of transport is dedicated transport (from a single ILEC),⁵⁴ or the transport involves tandem switching and shared transport (but provided by more than one ILEC).

The 1996 Act – and the Commission’s implementing rules – stand in stark contrast to the ILEC ABC Plan and its proposal for the selective pricing of transport and termination. Requesting carriers are entitled to cost-based rates for *both* transport and termination, and for *both* the dedicated and tandem-switched transport configurations. The *Competitive Amendment* recognizes that these fundamental duties cannot be compromised and proposes a transition to

of the transition, both originating and terminating intrastate dedicated transport rates are transitioned to interstate levels.” (Framework of Plan, at 11).

⁵³ ABC Plan, Attachment 1 at 11.

⁵⁴ It is critical that the Commission make clear that carriers are entitled to TELRIC-based transport for the dedicated transport option because most Interconnection Agreements include provisions that require dedicated transport when certain engineering parameters indicate that justify a DS1 direct trunk. See, for instance, paragraph 4.3.2.4 of AT&T 22-State Generic Interconnection Agreement, available at: <https://clec.att.com/clec/shell.cfm?section=115>

cost-based reciprocal compensation rates not only for termination, but each of the transport options as well.

It appears that the ABC plan proposes to price dedicated transport at the levels found in the interstate access tariff (which are comparable to special access rates), while embedding the cost of tandem-switched transport (and tandem switching) within the \$0.0007 rate – at least under certain circumstances.⁵⁵ If that is so, creating disparate treatment between dedicated and tandem-switched transport is not only unlawful,⁵⁶ it would introduce a number of issues and distortions.

To begin, the ABC Plan's approach to transport gives lie to any claim that the ABC Plan will eliminate arbitrage opportunity by charging the same rates for all types of traffic. To the contrary, the Plan appears to apply different *transport* rates to “access traffic” than it would apply to “local traffic,” at least where dedicated transport is involved (or more than one ILEC is involved in providing tandem-switched transport). So long as the combined charge (that is, the rate for both transport and termination) differs by jurisdictional label, arbitrage opportunities arise. Moreover, because tandem-switched transport and dedicated transport can be substitutes (at least, to end offices meeting certain traffic levels), it is important that the economic consequences of using one or other (that is, what a carrier would pay) properly reflect the underlying cost differential (of the carrier being compensated). As noted, the ABC Plan appears to propose that dedicated transport would be priced at the levels found in the interstate access tariff, which (as the Commission is well aware) are priced substantially above TELRIC; yet the

⁵⁵ As noted, the ABC Plan with regard to transport is more notable for what it *doesn't* explain.

⁵⁶ Because the ABC pleadings never openly acknowledge its intention to maintain different rate and legal structures for some forms of transport, its legal analysis never explains how such an approach would be lawful.

plan proposes to include tandem-switched transport (in most instances) in the \$0.0007 rate (which is generally below TELRIC-cost).

The proper solution is for the Commission to adopt a reformed set of cost-based prices for transport and termination – and for *all* forms of transport – that is applied to all minutes and circuits, without regard to the jurisdictional labels of the traffic. Only in this way can the Commission comply with the statute and, just as importantly, eliminate arbitrage and provide the appropriate price-signals to guide network design. The *Competitive Amendment* achieves just this result by grounding all transport and termination rates in the cost-based analyses of the state commissions (as required by the Act and the Commission’s rules).

D. CLECs Must Be Provided A Comparable Transition Period

The Commission seeks comment on whether an approach that provides different transitions for different types of carriers would raise any policy concerns,⁵⁷ as well as the appropriate revenue recovery mechanism for ICC reform.⁵⁸ The ABC Plan provides a special recovery mechanism for ILECs to provide the time and opportunity to adjust to lower intercarrier compensation revenues. This recovery mechanism has two components: (a) a set of staged increases in single-line SLC caps to enable ILECs to raise consumer rates to offset lower ICC revenues, and (b) an “access recovery mechanism” (“ARM”) that would provide additional revenues collected through an increase in the USF contribution factor. Together, these provisions provide ILECs with an eight-year transition to adjust to lower ICC revenues. Under the ABC Plan, the ILECs will experience only a *cumulative* 10% reduction in access revenues in

⁵⁷ *Further Inquiry* at 13.

⁵⁸ *Id.*

the first 5 years of the plan, with a three year phase-out of any ARM subsidy during the Plan's final 3 years.

In contrast, the ABC Plan imposes the *full* decline in intercarrier compensation revenues on a CLEC in the first five years, with no additional transitional window to adjust its business plan. Moreover, the ABC Plan does not contemplate any change in the multi-line business SLC that might otherwise provide some competitive opportunity for offsetting revenues to COMPTTEL members that compete primarily in the business market. In order to make the plan more equitable, the *Competitive Amendment* proposes to correct this imbalance by providing CLECs an equivalent eight-year transition to reciprocal compensation rates for all traffic (that is, the end-date for the CLEC transition would match the July 1, 2020 end date of the ILEC transition when the recovery mechanism is taken into consideration),⁵⁹ and requires that the ARM be reduced by imputing the same SLC increase to multi-line business lines that the ABC plan grants for single-line service.⁶⁰

Such a proposal is similar to what some states have done to address the inequity of some carriers receiving revenue recovery for a period of time, while others do not. As the Michigan Public Service Commission explained, in its comments to this proceeding, because CLECs are excluded from those providers eligible for disbursements from the ARM, the Michigan Telecommunications Act treats CLECs differently with respect to the time frame for reductions

⁵⁹ Under the *Competitive Amendment*, CLEC interstate and intrastate terminating access charges would transition to reciprocal compensation rates in nine-equal steps (which occur over 8 years and one day.)

⁶⁰ The *Competitive Amendment* does not require that an ILEC implement any of the SLC increases, but it would reduce the ARM by assuming that an ILEC increased the single-line and multi-line SLCs by the same amount.

in intrastate access charges. In particular, CLECs are provided four years of additional time, not allotted to eligible providers, to reduce their rates.⁶¹

Likewise, under the Georgia law, certain LECs (what the Georgia statute refers to as Tier 2 local exchange companies) were allowed adjustments to basic local service or supplemental universal access fund support to offset revenues lost as a result of the transition of intrastate rates to interstate levels, while other carriers were not provided such recovery. These Tier 2 carriers had 5 years to reduce their rates, but recovered the lost revenue through the universal service fund for 10 years. In order to make the transition more equitable, the time period provided to CLECs (which are not eligible for revenue recovery) was 10 years to reduce rates in order to coincide with the Tier 2 carriers revenue recover period – which in effect is the true transition period – rather than the 5 year period the Tier 2 carriers were allowed to reduce their rates.

E. VoIP Traffic Should Be Treated the Same as Any Other Traffic

The Commission seeks comment on the implementation of the ABC's Plan's proposal for VoIP intercarrier compensation.⁶² As an initial matter, the Commission must address the appropriate ICC rates applicable to VoIP traffic. As the ABC Plan states, the ICC treatment of VoIP traffic has been the subject of long-running disputes. Under the ABC Plan, however, VoIP traffic would be subject to intercarrier compensation rates different from rates applied to other access traffic during the first part of the transition.⁶³ In particular, with the exception of local calls, VoIP traffic would be subject to the interstate access rates regardless of the location of origination of the call. Implementation of this aspect of the ABC Plan is inconsistent with the

⁶¹ Reply Comments of Michigan Public Service Commission at 13 (filed May 23, 2011).

⁶² *Further Inquiry* at 17.

⁶³ *Further Inquiry* at 17; ABC Plan at p. 10.

Commission's "competitively and technology neutral" policy and goal of eliminating arbitrage. VoIP traffic should be subject to the same intercarrier rates (i.e., interstate access, intrastate access, and reciprocal compensation) as any other voice telephone call during the transition period.

As the Commission has previously stated, intercarrier compensation "must be competitively and technologically neutral... [with] similar rates for similar functions."⁶⁴ As Bright House points out in its comments to this proceeding, granting a carrier better termination rates based on technology will guarantee "profound marketplace distortions based on arbitrary regulatory rules rather than the inherent advantages of different technologies."⁶⁵ Discriminating in favor of carriers using one technology over another skews investment decisions, which is not an appropriate role for policy makers.⁶⁶

The ABC Plan provides no justification for establishing a different compensation scheme for such traffic. The justification used in the *Vonage Order* - that it was impossible or impractical to separate the interstate and intrastate components of the Vonage Digital Voice service - is not applicable to fixed VoIP services. Unlike Vonage subscribers, who can originate calls from any broadband connection (supposedly making it impossible to determine the origination point of a particular call), subscribers to fixed VoIP services generally originate all calls from the same location. Consequently, the origination point of a call can be ascertained.

⁶⁴ Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33, ¶ 33 (2005).

⁶⁵ Comments of Bright House Networks Information Services, LLC, WC Docket No. 10-90 *et al*, at 4 (filed Apr. 1, 2011).

⁶⁶ See NARUC Comments, WC Docket No. 10-90 *et al*, at 4-5 (filed Apr. 1, 2011) ("[P]olicy makers should not tilt the competitive playing field by choosing to favor (or disadvantage) any particular carrier based solely upon the technology used to deliver a functionally equivalent service.").

As tw telecom has explained, there is no meaningful difference, for purposes of jurisdictional analysis, between fixed VoIP services and circuit-switched services in terms of communications between subscribers or network architecture to provide the service.⁶⁷

Distinguishing interconnected VoIP traffic from other voice traffic terminating on a carrier's network, on the other hand, may not be technically feasible.⁶⁸ As a result, terminating carriers will be forced to rely on the transmitting carrier or carriers – which have an incentive to identify traffic in manner that results in the lowest intercarrier compensation rate - to identify the type of voice traffic.⁶⁹

II. UNIVERSAL SERVICE – ANY CONNECT AMERICA FUND SHOULD BE CARRIER-NEUTRAL AS WELL AS TECHNOLOGY NEUTRAL

COMPTEL supports transforming the current universal service plans to support broadband network deployment in high-cost areas, as described in the National Broadband Plan. Similarly, COMPTEL supports the stated goal of the ABC Plan to focus on distributing universal service support to areas of the nation where “there is no private sector business case” for broadband network deployment.⁷⁰ To achieve that goal, however, the Commission should ensure that all carriers – incumbent and competitive, wireless and wireline – have the same incentive to deploy broadband to unserved and underserved areas. Accordingly: (1) bidding processes for USF support should be carrier neutral as well as technology neutral and (2) USF

⁶⁷ See Reply Comments of CBeyond, Inc. *et al*, WC Docket No. 10-90 *et al*, at 9 (filed Apr. 18, 2011), *citing* Letter from Thomas Jones, Counsel for tw telecom, inc. to Marlene Dortch, Secretary, FCC, CC Docket No. 01-92 *et al*, at 2-8 (filed Oct. 23, 2008).

⁶⁸ See Comments of Cbeyond *et al*, WC Docket No. 10-90 *et al*, at 6 (filed Apr. 1, 2011). There is no identifier in call detail records that unambiguously establishes that a call was originated using a particular technology.

⁶⁹ *Id.*

⁷⁰ ABC Plan, Attachment 1 at 2.

recipients should operate open networks that are fully interconnected and integrated with existing networks. With regard to retail rate regulation and carrier of last resort obligations (“COLR”), the Commission should follow the statutory procedures legislated by Congress in the Act in evaluating whether and to what extent it should “eliminate legacy ... regulation” or “preempt” state laws and regulations.⁷¹

A. The ABC Plans “Procurement Model” Should Apply On A Competitively Neutral Basis To All Wire Centers Eligible For Support

An auction or “procurement” model for universal service support under the proposed Connect America Fund (“CAF”) is permissible under the Act so long as the Commission employs competitively neutral distributions methods. In *all* – not *some* – areas eligible for support “any qualified wireless or wireline provider that can meet the specified broadband service obligation” should be eligible to “apply for the baseline support and the obligation to serve the associated census blocks.”⁷² Competitively-neutral distribution methods will not guarantee any one carrier a particular result, but will instead ensure that CAF funds are deployed as efficiently as possible.

The ABC Plan proposes a “right of first refusal” guarantee to CAF support for ILECs in wire centers where they providers have made broadband available to 35% or more locations.⁷³ Only after an ILEC “passes” are other carriers able even to compete in an auction to deploy broadband in high-cost and otherwise underserved areas. Neither the ABC Plan nor its legal analysis provides any justification for the 35% threshold or the notion that the ILEC should get

⁷¹ ABC Plan, Attachment 1 at 13.

⁷² ABC Plan, Attachment 1 at 6.

⁷³ ABC Plan, Attachment 1 at 6.

100% of proposed funding. Accordingly, the Commission should reject proposed right of first refusal.

Competitively-neutral bidding rules will maximize available broadband at the minimum level of costs. In cases where incumbents have deployed broadband facilities, they will have a strong incentive to bid for CAF support. This is particularly true in areas where they have surpassed the 35% deployment threshold, as the incremental cost of deploying additional broadband in those areas should be on the decline. The ABC Plan offers no suggestion to the contrary. Indeed, one would expect that incumbents would have a tremendous bidding advantage in areas they already serve, as they already would have incurred the “sunk” costs of initial deployment.

B. CAF Recipients Should Operate Open, Interoperable Networks

The ABC Plan acknowledges that companies receiving CAF monies have to agree to build out and broadband service obligations.⁷⁴ COMPTTEL submits that CAF recipients should agree to operate open networks to ensure that supported broadband networks are fully interoperable and integrated with newly emerging networks and the PSTN.

The ABC Plan contains no discussion of how CAF-supported broadband networks will fit in with the nation’s existing and future communications infrastructure. As these networks will be supported by federal funds and used to benefit consumers in unserved and underserved areas for voice and data services, the Commission should clarify the co-carrier relationships - including wholesale obligations - that will be associated with these networks.

Foremost, basic notions of common carriage should apply to CAF-supported networks. Carriers operating a CAF-supported network should be obligated to interconnect with other

⁷⁴ ABC Plan, Attachment 1 at 7.

carriers on terms and conditions that are just, reasonable, and nondiscriminatory, and offer wholesale services to ensure that the maximum amount of service options are available in unserved and underserved areas. The Commission also should clarify that these networks will be included within the scope of the Commission's intercarrier compensation mechanisms on a technology-neutral basis. CAF-supported networks similarly should be required to abide the Commission's long-standing policies against call blocking, choking, or otherwise limiting the ability of consumers to interact with content providers or consumers served by other networks. Finally, CAF-supported networks also should abide by all legal and regulatory requirements that serve to protect consumers (*e.g.*, CPNI and TCPA requirements).

At bottom, the Commission must make clear that all CAF-supported networks will be incorporated into the nation's telecommunications infrastructure in a way that supports the ability of consumers and businesses to communicate with one another in a ubiquitous and seamless manner. Wholesale service obligations as well as traditional common carriage obligations will ensure that consumers in rural and insulated areas will receive the best possible array of service offerings. Non-CAF network should not be placed at any legal or regulatory disadvantage by virtue of exchanging communications traffic with a CAF-supported network.

C. The Commission Should Follow Statutory Procedures Legislated By Congress In Determining Whether To Eliminate Regulation Or Preempt State Laws

COMPTEL acknowledges that transitioning universal service programs to support broadband may in some cases require changes to federal and state retail regulation, including Eligible Telecommunications Carrier ("ETC") regulation and state COLR laws and regulation. To address these issues, COMPTEL submits that the Commission (and the industry) should utilize the processes congress legislated in the Act, rather than take the unspecified, sweeping

action of eliminating untold federal “legacy regulation” and “preempting” state universal service systems applicable to “price cap incumbent LECs.”⁷⁵

With regard to federal regulation, Congress provided at least two processes by which price cap incumbent LECs make seek the elimination of regulation. In Section 10 of the Act, 47 U.S.C. § 160(c), Congress provided for the ability of “any telecommunications carrier, or class of telecommunications carrier” to petition the Commission to forbear from enforcing regulation applying regulation. The statute mandates Commission action on such petitions within 15 months.⁷⁶ In Section 11 of the Act, 47 U.S.C. § 161, Congress codified a “biennial review” process that obligates the Commission to review its regulations and determine whether they are “no longer necessary in the public interest. In such an instance, the Commission is obligated to repeal its regulations.

The ABC Plan and its associated legal analysis contain no discussion of either of these congressionally-mandated processes. Of perhaps greater concern, the ABC Plan fails to identify with any specificity the “legacy” regulation that it claims “must” be eliminated “no later than July 1, 2016.”⁷⁷ Sections 10 and 11 of the Act provide specific, alternative roadmaps for the review and potential elimination of “legacy” regulation in accordance with the time requests of the ABC Plan proponents. For example, if the Commission were to adopt new universal service regulations in response to the ABC Plan or other plans within the next year, affected parties would have ample time to petition the Commission to eliminate potentially unnecessary regulation before the July 1, 2016 deadline suggested by the ABC Plan. COMPTTEL notes that

⁷⁵ ABC Plan, Attachment 1 at 13.

⁷⁶ 47 U.S.C. § 160(c).

⁷⁷ ABC Plan, Attachment 1 at 13.

neither the Section 10 forbearance process nor the Section 11 biennial review process is perfect, and indeed, COMPTTEL has noted substantial procedural shortcomings. However, these types of statutory processes constitute the minimum process the Commission should utilize in repealing regulations.⁷⁸ The Commission should never short circuit procedures for reviewing regulations established by Congress, and that is particularly true here, as the ABC Plan identifies no shortcomings in the review mechanisms codified in the Act.

As to state law and regulation, Congress established Section 253, 47 U.S.C. § 253, of the Act as the correct process for evaluating whether preemption of state USF requirements is appropriate. The entire purpose of Section 253 is to remove barriers of entry, which necessarily includes state regulation that may have the unintended effect of hindering the evolution and further deployment of broadband infrastructure. In cases where the Commission determines that a specific state “statute, regulation, or legal requirement” constitutes such a barrier to entry (which may include thwarting universal service goals), the Commission is obligated to preempt state enforcement of the offending obligation.

The ABC Plan and its legal analysis contain no discussion of the Section 253 process. This should be of particular concern to the Commission, as Section 253(b) specifically protects the ability of state legislatures and commissions to “preserve and advance universal service.”⁷⁹ Further, even the ABC Plan acknowledges that some states have “eliminated” COLR obligations, others have “dramatically scaled them back,” and still others are “actively considering

⁷⁸ To the extent the Commission utilizes the processes outlined in Sections 10 or 11, the Commission should ensure that the petitioners bear the burden of proof that *specific* regulations are no longer necessary to support universal service goals.

⁷⁹ 47 U.S.C. §253(b).

eliminating ... existing obligations.”⁸⁰ The ABC Plan identifies no instance where a state has unreasonably preserved outmoded USF-related regulation, and all of the evidence presented demonstrates that states are acting reasonably. But to the extent a state universal service law or regulation is limiting the deployment of broadband, the proper course of action is for the Commission to evaluate the specific issue at hand as provided for by Congress, rather than through the open-ended preemption sought in the ABC Plan.

CONCLUSION

The issues in this proceeding are complex and crucial, and there is widespread consensus that the time for fundamental reform is now. COMPTTEL has worked hard with its members to negotiate a *Competitive Amendment* to the ABC Plan that would create a balanced transition to an IP future. Significantly, all of the reform will prove meaningless if the Commission does not create the legal foundation for the IP-to-IP interconnection arrangements that will ultimately replace the transport and termination arrangements being re-priced here. For all its claims, the ABC Plan is fundamentally a backward- looking compensation plan, addressing the interconnection arrangements of the past, without creating the necessary preconditions (i.e., the framework of Sections 251/252) to negotiate the arrangements of the future. The Commission should move forward with intercarrier compensation reform, adopting the provision addressed in the *Competitive Amendment*. Additionally, the Commission should incorporate the proposals for improving universal service, discussed above, when reforming universal service.

⁸⁰ ABC Plan, Attachment 5 at 59-60.

Respectfully submitted,

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